No. 91-780

Supreme Court, U.S.
FILED
NOV 13 1991
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In The Supreme Court of the United States

October Term, 1991

WILLIAM H. CURTIS and BRENDA M. CLAPP
Administrators of the Estates of John A. Goff, Sr. and Linda A. Goff, et al
Petitioner

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States may be held liable under the Federal Tort Claims Act for the negligence of the Federal Aviation Administration in failing to take actions mandated by its own regulations where its regulations required it to revoke John W. Stroupe's certificate **immediately** after August 3, 1987, but it failed to do so until October 2, 1987, resulting in the death of four people.

2. Whether the United States may be held liable under the Federal Tort Claims Act for the negligence of the Federal Aviation Administration in certifying an aircraft mechanic, thereby giving him the power to return aircraft to service as airworthy, where the FAA had actual knowledge of the gross incompetence of the mechanic in question and where the FAA had actual knowledge of the mechanic's repeated fraud and falsification of records.

3. Whether the Court of Appeals for the Eleventh Circuit has sanctioned such a gross departure from the accepted and usual course of judicial proceedings so as to merit reversal, when it affirms a grant of a motion to dismiss for failure to state a claim before any record has been developed in the case.[1]

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[1]Additional parties to this case not named in the caption are John A. Goff, Surviving Son, and George A. Clapp, Guardian of Jennifer Ann Goff and Susan Deborah Goff, Surviving Daughters of John A. Goff, Sr. and Linda A. Goff.

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Jurisdictional Statement

The judgment and opinion sought to be reviewed was rendered by the Court of Appeals for the Eleventh Circuit on August 15, 1991, wherein the September 27, 1990 Order of the U. S. District Court for the Northern District of Georgia, dismissing plaintiff's action, was affirmed. Jurisdiction vested in the District Court pursuant to 28 U.S.C. §1346(b). A Petition for Rehearing and Suggestion of Rehearing en banc to the Court of Appeals for the Eleventh Circuit was denied on October 16, 1991.

Jurisdiction to review the decision of the Court of Appeals for the Eleventh Circuit by Writ of Certiorari is conferred upon this Court pursuant to 28 U.S.C. §1254(1). This Petition for Writ of Certiorari is filed within 90 days of the entry of judgment by the Court of Appeals for the Eleventh Circuit, pursuant to 28 U.S.C. §2101(c) and Rule 13 of the Rules of the Supreme Court of the United States.

Statement of the Case

1. Material Facts

On December 6, 1987, a Piper Cherokee Six aircraft bearing federal registration number N5587J crashed near LaGrange, Georgia due to engine malfunction. All four people on board were killed. Shortly before the crash the engine had been certified as airworthy and certified as having been overhauled by John W. Stroup, Jr. In the post-crash examination of the engine, it was determined that the overhaul of that engine and the certification of that engine as airworthy was either fraudulent or grossly negligent.

The FAA has had specific and repeated actual knowledge that John W. Stroup was utterly unqualified to work on aircraft engines or to certify them as airworthy over the course of many years. The FAA's failure to stop John W. Stroup, Jr. from overhauling and certifying engines borders on criminal negligence.

As far back as 1953, the FAA had problems with Mr. Stroup. The list of problems with which he has been involved, and the types of problems with which he has been involved, are frightening.

On January 30, 1953, his powerplant rating was denied due to a failure to correctly identify components.

On March 19, 1953 his powerplant rating was denied due to lack of knowledge concerning powerplants.

On July 10, 1953, his powerplant rating was denied due to an improper engine overhaul.

On September 14, 1953, he finally obtained a mechanic's certificate with a powerplant rating. On September 6, 1958 he obtained an airframe rating.

On January 31, 1961, his mechanic's certificate was suspended for sixty days for putting the **wrong** engine on an aircraft.

On March 29, 1971, the Southern Regional Counsel proposed to revoke his mechanic's certificate for improper engine overhaul including piston rings that were worn beyond specifications, severe corrosion on the intake and exhaust valve stems, and valve faces being worn beyond specifications.

On June 4, 1971, following an informal conference with the Regional Counsel's office, his certificate was suspended for six months. On December 15, 1971, that suspension was reduced to three months upon appeal to the National Transportation Safety Board law judge. That hearing revealed that Mr. Stroup did not have the correct overhaul manual while ordering parts for the engine, and he could not properly identify correct components for the engine.

On July 21, 1972, his powerplant rating was

suspended for ninety days.

On March 15, 1974, it was proposed that his powerplant rating be revoked for improper overhaul of an engine which included cracks in the crankshaft propeller flange radius, the flange being bent in excess of approved tolerances, and valves which had been ground beyond limitations. In an informal meeting with the Regional Counsel on April 3, 1974, Mr. Stroup stated he only signed off the logbook and that he did not assemble the engine, therefore he was not responsible (a clear violation of Federal Aviation Regulations).

On August 12, 1974, his mechanic's certificate and inspection authorization were both revoked. On May 16, 1975, the NTSB law judge upheld the revocation, but on September 12, 1975, the full board of the National Transportation Board upheld the revocation of the inspection authorization, but suspended the mechanic's certificate for ninety days only.

On July 20, 1976, his powerplant rating was suspended for six months.

On March 17, 1978, his powerplant rating was revoked.

On December 13, 1982, his powerplant rating was again revoked.

On August 3, 1987 at the Air Center of Miami, another engine that Mr. Stroup had worked on had

serious problems. The investigation disclosed that he had failed to use proper maintenance techniques and procedures; the engine was not at least equal to its original properly altered condition and was not airworthy; that he had made **several** **fraudulent** entries in the maintenance log, and that he had failed to enter his certificate number into the logbook. These facts were all available to the FAA and yet the FAA waited until October 2, 1987 to exercise its emergency powers issuing an order revoking his mechanic's certificate. That order was ultimately affirmed by the full board of the NTSB by order of January 20, 1988.

The FAA had actual knowledge of this extensive history of serious infractions of the Federal Aviation Regulations. These infractions were not of a minor or hyper-technical type. Rather, these infractions were as fundamental as certifying that work had been done when it had not been done, putting the wrong engine in an airplane, being unable to identify the appropriate components to be put into an aircraft engine and fraud. The Federal Aviation Administration was negligent in allowing John W. Stroup, Jr. to have any authority to work on or inspect engines of any sort. Nonetheless, on October 1, 1987, one day before the Federal Aviation Administration revoked his certificate, John W. Stroup signed the logbook of the engine involved in the subject crash certifying that the engine had been overhauled and certifying that the aircraft was airworthy. That certification is the pilot's guarantee that the maintenance has been conducted in accordance with the Federal Aviation Regulations and the manufacturer's

specifications, and that all of those requirements have been fully met, i.e. that the aircraft is airworthy. When the mechanic signs off in a logbook, he is required to list his Federal Aviation Certificate number along with his signature in the logbook. That is the pilot's guarantee that the person doing the work on the engine and/or the person inspecting the engine have been diligently tested and inspected by the Federal Aviation Administration and that the FAA has found them to be competent and capable.

No pilot would ever have his aircraft's maintenance accomplished and/or inspected by a mechanic who was not certified by the Federal Aviation Administration. First, to do so would be foolish. Secondly, if the work has not been done by a FAA certified mechanic, and if the work has not been inspected by an FAA certified mechanic, then the aircraft is not legally airworthy.

If the FAA had not reinstated John W. Stroup, Jr.'s mechanic's certificate, he would not have been in a position to release an aircraft for flight which was not airworthy, and the four people involved in this crash would still be alive. If, after the August 3, 1987 incident, the FAA had immediately revoked his certificate as required by the FAA's own internal regulations, he would not have been in a position to release an aircraft for flight which was not airworthy, and the four people killed in this crash would be alive today.

Order 2150.3 is the FAA's own internal procedure that would have required the FAA to immediately r- voke

John W. Stroupe's authority to overhaul and inspect aircraft engines and certify them as airworthy for return to service. The FAA failed to follow its own procedures, causing the fatal crash in question.

2. Procedural Facts

In response to Petitioner's Complaint the United States filed a Motion to Dismiss. The United States never filed an Answer. There has been no discovery. The Petitioners amended their Complaint once. The District Court granted the Motion to Dismiss. On appeal to the Eleventh Circuit the District Court's dismissal was affirmed. On October 16, 1991, the Eleventh Circuit entered an Order denying a Motion for Rehearing.

Summary of Argument

In essence, petitioners seek to recover against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. §§2671 et seq for the negligence of the Federal Aviation Administration in causing the death of petitioners' decedents. The FAA caused these deaths by failing to exercise ordinary care to carry out duties created under Georgia law and duties created by Federal mandates.

Petitioners seek to recover for the negligent failure of the FAA to follow its own internal orders that required it to immediately revoke John W. Stroupe's authority to certify aircraft as airworthy -- the FAA's delay causing

the death of petitioners' decedents. Petitioners seek to recover for the negligence of the FAA in issuing John W. Stroupe a certificate authorizing him to overhaul and inspect aircraft when the FAA already knew, in no uncertain terms, that John W. Stroupe was incompetent and prone to falsify records.

In holding that the FAA could not possibly owe an actionable duty to petitioners' decedents, the Court of Appeals for the Eleventh Circuit in this case directly contradicts the decisions in another circuit based on the same issues. United Scottish Ins. v. United States, 692 F.2d 1209 (9th Cir. 1982), rev'd on other grounds 467 U.S. 797 (1984). At the same time the decision at issue here ignores the clear law in the state of Georgia that would create an actionable duty in a private citizen if he were in the same position as the United States.

Moreover, the Eleventh Circuit's decision in this case violates the principles set forth in Berkovitz v. United States, 486 U.S. 531 (1988). After this Court decided Varig, infra the United States took the position that a federal agency's regulatory activities could never give rise to a private cause of action. In Berkovitz this Court squarely held that where an agency of the United States violates its own internal rules and regulations that negligence may give rise to a private cause of action.

The District Court's grant of a Motion to Dismiss for failure to state a claim in the absence of any factual record is such a blatant departure from normal judicial proceedings as to require reversal.

ARGUMENT

I. The FAA's negligent violation of its own procedures gives rise to a private cause of action.

The FAA had actual knowledge of the incompetence of John W. Stroupe, Jr. as an aircraft mechanic for many years. Moreover, the FAA received word that he had, again, jeopardized the lives and property of the flying public and those on the ground as a result of an engine failure on August 3, 1987. Any concept of ordinary care would suggest the need for the FAA to take immediate action to stop this man from working on aircraft engines. The FAA certainly had that power. Additionally, the FAA's own regulations required it to take immediate action to revoke Mr. Stroupe's certificate. Instead of acting immediately, as dictated by its own regulations, and as dictated by simple logic, the FAA allowed this mechanic to continue his life threatening practices for another two months before the FAA revoked his license. As it happened, the subject aircraft was returned to its owners, by John W. Stroupe, Jr., the day before the FAA revoked his certificate. Had the FAA acted even one day sooner, four people would not have died needlessly.

Under the Federal Tort Claims Act, the United States is frequently found liable when air traffic controllers violate the terms of their own operations manual. See e. g., Ingham v. Eastern Air Lines, Inc., 373 F.2d 227, 233 (1967); Yates v. United States, 497 F. 2d 878, (10th Cir. 1974); Wasilko v. United States, 300

F.Supp. 573 (1967). Petitioners in this case point out that the employees of the FAA blatantly violated the terms of Order 2150.3[2] which would require them to have immediately revoked Mr. Stroupe's certificate. Their failure to follow their own procedures resulted in the deaths of the petitioners' decedents. By analogy, the air traffic controller cases are clear precedent for the petitioners' contention that their complaint states a claim.

The Federal Aviation Act of 1958 is the origin of the FAA's statutorily imposed duty and undertaking in this case. The preamble to that Act describes it as :

> An act to continue the Civil Aeronautics Board as an agency of the United States, to create a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the air space by both civil and military aircraft, and for other purposes.

Act of August 23, 1958 (Public Law 85-726, 85th cong., Second Sess. 72 Stat. 731; 49 U.S.C. §1301.) Section 102 of the Federal Aviation Act of 1958 includes the following language under its declaration of policy:

(a) In the exercise and performance of its

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[2]This Order is effective throughout the whole FAA as distinguished from a local order such as the one in Clemente v. United States, 567 F.2d 1140 (1st Cir. 1978).

> powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity: (1) the assignment and maintenance of safety as the highest priority in air commerce . . . (2) the prevention of any deteriorating in established safety procedures, recognizing the clear intent, encouragement and dedication of the Congress to the furtherance of the highest degree of safety in air transportation and air commerce, and the maintenance of the safety vigilance that has evolved within air transportation and air commerce and has come to be expected by the traveling and shipping public. . .

49 U.S.C. §1302. That Act also states:

> (a) The Secretary of Transportation is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time: (1) such minimum standards governing the design, materials, workmanship, construction and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety . . . . (3) reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and

> (C) in the discretion of the Secretary of Transportation, the periods for, and the manner in which, such inspection, servicing and overhaul shall be made, including provision for examinations and reports by properly qualified service persons whose examinations or reports the Secretary of Transportation may accept in lieu of those made by its officers and employees . . . .

49 U.S.C. §1421.

Under the authority of the Federal Aviation Act of 1958, the Federal Aviation Administration, in conjunction with the Department of Transportation, has promulgated the Federal Aviation Regulations found in 14 CFR §13.1 et seq. That Regulation contains the following language:

> (b) If, as a result of such a reinspection, reexamination, or other investigation made by the Administrator under Section 609 of the FAA Act, the Administrator determines that the public interest and safety in air commerce requires it, the Administrator may issue an order amending, suspending, or revoking, all or part of any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate or air agency certificate. . . .

14 CFR §13.19 (b). In this context, Mr. John Stroupe would have an "airman certificate." 49 U.S.C. §1301(7).

Pursuant to that Federal Aviation Regulation, the Department of Transportation, Federal Aviation Administration has promulgated Order 2150.3 entitled Compliance and Enforcement Program. This Order fills out the specifics of how the purpose contained in the Federal Aviation Act of 1958 and the specific rules contained in 14 CFR are to be carried out. Chapter 2 of that document contains the following guidance for those individuals within the FAA who must carry out the FAA's duties and responsibilities on a daily basis. In other words, this is the document that extablishes the standard of care for the people alleged to have been negligent in this case. A few pages from that Order are found in the Appendix. This material expressly states that:

> The FAA is charged with the responsibility to assure that the highest possible degree of safety in air transportation and air commerce is maintained. . . .
>
> (b) Finally, the agency has a statutory obligation to assure compliance with all regulations. This obligation is especially critical as it applies to holders of FAA certificates. Individual inspectors, managers, and attorneys must clearly understand the crucial role they play in achieving compliance. . . .
>
> The Federal Aviation Act of 1958 places a duty on the administrator to prescribe reasonable rules, regulations, orders, and minimum standards

in the public interest. Once a regulation is issued, it is expected there will be compliance with all requirements contained in the regulation. A violation of any regulation must be responded to with an effective enforcement program. . . .

Prompt action is essential to assure a fair enforcement program. Unnecessary delays in the investigation cannot be tolerated. Every effort must be made to expeditiously investigate and report violations. The responsibility to act promptly rests equally upon the inspector investigating the incident as well as the regional and Washington offices responsible for enforcement action. Delays in processing violation reports weaken the effectiveness of the agency's enforcement program in several ways. First, such delays may permit an unsafe condition to prevail if prompt corrective action is not taken. . . . (Emphasis added).

When violations occur, firm action must be taken. A vigorous enforcement policy is necessary to achieve compliance with the regulations and we must forcefully respond to violations. . . .

(1) Revocation of a certificate or a rating should be sought in all cases where there is lack of capability or other deficiency incapable of immediate correction; in cases where the certificate holder has demonstrated by repeated offenses an unwillingness or inability to comply

with the principles of air safety; and in cases where the continued exercise by the individual of the privileges of the certificate would be detrimental to the public interests. For example, revocation should be sought in cases where an aircraft is used for smuggling or transporting narcotics or where there is falsification of records.

(2) In cases involving organizations, revocation should be sought where their conduct demonstrates lack of qualification; i.e., deliberate and flagrant violations; falsification of records. . . .

(1) Emergency suspension or revocation of certificates.

(a) Emergency action in suspending or revoking a certificate or manufacturing approval should be taken only when it is clearly needed in the public interest and must be taken immediately when the need for such action is recognized.

The emergency authority will not be used for punitive reasons. Evidence for such action must show a lack of qualification or that the certificate holder likely will continue exercising the privileges of the certificate.

(b) The following are examples of when

emergency action might be appropriate:

> 5. When the holder of a repair station certificate returns unairworthy aircraft to service, and it is determined that they do not have an inspection system that will produce satisfactory quality control.[3]

The facts alleged in this case demonstrate that the FAA had actual knowledge that John Stroupe had a mechanics certificate; that John Stroupe was incompetent to overhaul or inspect aircraft engines; that John Stroupe was known to falsify records; that John Stroupe did not have an inspection system that would produce satisfactory quality control; that John Stroupe returned unairworthy aircraft to service. The government cannot deny any of these allegations since the FAA exercised its powers under the emergency revocation provisions and thereby revoked John Stroupe's certificate on October 2, 1987.

The fact that these statutes, regulations and orders, or ones similar to these, have the effect of law, has been a sufficient basis for many courts to make the finding

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[3] This Order, unlike the Airport and Airway Development Act in Sellfors v. United States, 697 F.2d 1362 (11th Cir. 1983), cert. denied, 468 U.S. 1204 (1984), is the operational directive by which the day to day operations of FAA personnel are mandated.

that the government had a duty. It should be noted in this context that the federal government has totally occupied the field of regulating aviation maintenance to the point it has preempted any state law on the subject. 49 U.S.C. §1305; 14 C.F.R. §43.5 (1988); 14 C.F.R. §43.7 (1988); 14 C.F.R. §91.29 (1988). Those cases where the Courts have allowed these sorts of statutes to establish a duty are usually based on the government's undertaking that particular responsibility. The law cited above should make it abundantly clear that the federal government has made the commitment to shoulder the responsibility for safety of aviation maintenance; it has made that clear undertaking; the undertaking is so persuasive as to preempt state law and state regulations in the area. A good example of this reasoning can be found in Ingham v. Eastern Air Lines, Inc., 373 F.2d 227 (2d Cir. 1967), cert. denied, 389 U.S. 931 (1967). There the Court found that the air traffic controller violated a duty set forth in the Air Traffic Control Procedures Manual of the FAA. In that case, the FAA's internal procedures manual called for the reporting of weather conditions to pilots; in the case presently before the Court, the FAA's internal compliance and enforcement program contained in Order 2150.3 states that an emergency revocation of a mechanic's certificate must be taken immediately when the need for such action is recognized. The FAA clearly violated its own order in this case. Not only had the FAA had actual knowledge of the need of a revocation for many years, but the FAA again received notification of the need for such revocation as the result of an incident on August 3, 1987, and the FAA did not act immediately. Rather,

the FAA dawdled around until October 2, 1987 before revoking the mechanic's certificate in question. The violation of its order and the ensuing delay breached a duty which resulted in the death of four persons.

Petitioners have stated a claim under the Georgia Good Samaritan law. Georgia has adopted the Restatement (Second) Torts, §324A as the substantive law of the state. Huggins v. Aetna Casualty & Surety Co., 245 Ga. 248, 264 S.E.2d 191 (1980). Where states have adopted that formulation of the good samaritan law, an actionable duty has been found as against the United States. S. A. Empressa De Viacao Aerea Rio Grandense (Varig Air Lines) v. United States, 692 F.2d 1205 (9th Cir. 1982), rev'd on other grounds, 467 U.S. 797 (1984); United Scottish Ins. v. United States, 692 F.2d 1209 (9th Cir. 1982), rev'd on other grounds, 467 U.S. 797 (1984). Each of those cases was overturned by this Court pursuant to the discretionary function exception to the Federal Tort Claims Act.[4] The United States has not raised the discretionary function defense in this case. See Berkovitz v. United States, 486 U.S.

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[4]The Varig decision in the Supreme Court, holding that the activities in question were within the discretionary function exception to the Federal Tort Claims Act, was grounded on the fact that the inspections in question were not mandatory; the FAA chose to make spot checks only. The present case does not fall within that exception because the activities at issue here were not discretionary; Order 2150.3 states that following certain events the FAA must immediately use its emergency powers to revoke a mechanic's certificate. Those events occurred, but the FAA did not act immediately.

531 (1988).

In addition to the Good Samaritan Doctrine, Georgia negligence law contains other sources of a duty running from the FAA to the decedents. United States of America v. Aretz, 248 Ga. 19, 280 S.E.2d 345 (1981) (improper classification of explosives gave rise to an actionable duty from the United States to employees of the government's contractor); Hardy v. Brooks, 103 Ga. App. 124, 118 S.E.2d 492 (1961) (man with knowledge of a dead cow in the road has actionable duty to the traveling public to either (1) remove the cow from the highway or (2) give warning to others of its presence); Bradley Center, Inc. v. Wessner, 250 Ga. 199, 296 S.E.2d 693 (1982) (following Restatement Second, Tort §319, Georgia law provides that one who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person from preventing him from doing such harm); see, also, Jablonski v. United States, 712 F.2d 391 (9th Cir. 1983); Sims v. American Cas. Co., 131 Ga. App. 461, 206 S.E.2d 121, aff'd sub nom, Providence Washington Ins. Co. v. Sims, 232 Ga. 787, 209 S.E.2d 61 (1974) (persons relying on the inspection conducted by a third party have an actionable claim against the inspector even though the inspection was not conducted directly for the benefit of those relying on it.)

The District Court dismissed petitioners' case for failure to state a claim upon which relief can be granted, finding that there was no duty owed by the United

States to the petitioners' decedents. Whether the duty is found in the federal law, regulations and orders govering FAA performance or whether it is found in the common law and statutes of the State of Georgia, the District Court clearly erred in holding that no duty existed. Consequently, the Eleventh Circuit Court of Appeals erred in affirming the District Court's dismissal.

This Court should grant this Petition for Writ of Certiorari because the Eleventh Circuit's holding in this case is in direct contradiction of the Ninth Circuit's holding on the same issue. Additionally, this Court should grant the Petition for Writ of Certiorari because the Eleventh Circuit's opinion directly contradicts Berkovitz. The Eleventh Circuit's opinion could only be correct if the federal government never owes any actionable duty to the public as a result of regulatory activities. In Berkovitz, this Court held that some regulatory activities, especially those in direct violation of the agency's own mandates, give rise to an actionable duty and a private cause of action against the United States. Accordingly, petitioners respectfully request this Court to grant this Petition for the Writ of Certiorari.

II. The FAA's certifying John W. Stroupe as an aircraft mechanic and authorizing him to certify aircraft as airworthy with full knowledge of his incompetence and habit of falsifying records gives rise to a private cause of action.

After the long series of problems the FAA had with John W. Stroupe it should have refused to give him a

certificate as an aviation mechanic. In the argument above Petitioners contend that the FAA's failure to immediately revoke John Stroupe's certificate was actionable. For closely similar reasons the FAA owed the Petitioners' decedents a duty not to reissue John Stroupe a certificate after it had been taken away the last time. How many times must the FAA revoke a man's certificate before it is negligent to reissue that certificate? Based on past performance it was obvious that the flying public's safety was jeopardized by allowing this man to have a certificate.

Without the aid of the fact that the FAA violated its own procedure, these facts still state a cause of action under Georgia law. See, United States v. Aretz, 248 Ga 19, 280 S.E.2d 345 (1981); Bradley Center, Inc. v. Wessner, 250 Ga. 199, 296 S.E.2d 693 (1982); Huggins v. Aetna Casualty & Surety Co., 245 Ga. 248, 264 S.E.2d 191 (1980); Sims v. American Casualty, 131 Ga. App. 461, 206 S.E.2d 121, aff'd sub nom Providence Washington Ins. Co. v. Sims, 232 Ga. 787, 209 S.E.2d 61 (1974).

III. The Eleventh Circuit's ruling is inconsistent with Berkovitz v. United States, 486 U.S. 531 (1988).

After this Court's ruling in Varig supra. the United States took the position that all regulatory activity of federal agencies was protected under the discretionary function exception to the FTCA. That misconception was eliminated by Berkovitz v. United States, 486 U.S. 531, (1988). The Berkovitz case makes clear that the

discretionary function exception applies only to situations in which the federal agency is exercising policy discretion.

The only possible rationale for dismissing a case, before discovery, is if the Complaint could not state a claim under any possible set of facts. That would occur in this case if the regulatory activities of federal agencies could never give rise to a private cause of action. Berkovitz teaches otherwise. While the discretionary function is not at issue in this case, Berkovitz stands squarely for the proposition that under some sets of facts, where the federal agency has negligently violated its own internal procedures, a private person who is injured by that negligence has a cause of action.

IV. The trial court's dismissal of this case was far outside the accepted and usual course of judicial proceedings.

After the complaint was filed in this case, the United States filed a Motion to Dismiss. No answer was ever filed. No discovery was ever conducted.

A dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure is proper only in extraordinary cases and is generally disfavored by the courts. The moving party has the burden of demonstrating that no claim has been stated and the court must accept all factual allegations of the complaint as true, as well as all reasonable inferences therefrom. 2A Moore's Federal Practice, ¶12.07 [2.-5]; United States v. City of Redwood City, 640 F.2d 963 (9th Cir., 1981); Miree v. DeKalb

County, Georgia, 433 U.S. 25 (1977); Bank of America v. Touche Ross & Co., 682 F.2d 966 (11th Cir. 1986).

None of the factual issues in this case have been developed, even slightly. In this posture, the trial court may consider only the pleadings in determining a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Otherwise, it must convert the motion into a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. 2A Moore's Federal Practice, ¶12.07 [2.-5]. The trial court in this case did not convert the 12(b)(6) motion to a motion for summary judgment. It was therefore appropriate for the trial court to consider nothing but the pleadings. In considering those pleadings, the trial court is bound to liberally construe the allegations of the complaint, as amended. Sinclair v. Kleindienst, 711 F.2d 291 (D.C. Cir. 1983).

Although the trial court's order acknowledges that the court must accept the plaintiff's allegations as true and that the movant has the burden to show "clearly that no relief could be granted to the plaintiffs under any set of facts," the trial court then went on to make numerous findings of fact which are not, and could not have been, based on the record. On page 5 of the District Court's Order of Dismissal, it apparently finds that the FAA did not create the dangerous situation which gave rise to this aircraft crash, but the plaintiffs clearly alleged that the FAA did create the hazard. Contrary to the court's holding, the complaint clearly alleges that the FAA had actual knowledge that the particular aircraft mechanic

was a hazard to the lives of the flying public and yet, with that actual knowledge, the FAA empowered him to continue servicing and inspecting aircraft; the FAA negligently failed to revoke his mechanic's certificate; the FAA negligently failed to warn the owners of the subject aircraft that it had exercised its emergency powers to revoke the mechanic's certificate the day after they picked up their aircraft. The trial court apparently ruled that because the negligent mechanic had, in one sense, created the hazardous condition, that the FAA had, therefore, not created the hazardous condition. That further demonstrates the problem inherrent in granting a Rule 12(b)(6) motion when there is virtually no record from which to assess the facts. The plaintiffs in this case alleged that the government created the hazard by allowing a known incompetent to overhaul and inspect aircraft engines. If the facts bear out this allegation, the plaintiffs certainly would have proved that the FAA created the hazard.

At the top of page 6 of the Court's Order, the Court makes the erroneous statement that "finally, plaintiffs have failed to present any factual support for their conclusion that the decedents "actually relied" on the FAA inspection." In response to a motion to dismiss under Rule 12(b)(6), the plaintiffs have no burden to present any factual support for their allegations. The test is not whether the facts support the allegations, but rather whether any facts could conceivably exist which would support the allegations. The trial court clearly erred in holding the plaintiffs to the wrong burden of proof in this instance. The error is further compounded

by the fact that that reliance is established in this case as a matter of law. United Scottish Ins. Co. v. United States, 692 F.2d 1209, 1211 (9th Cir. 1982), rev'd on other grounds, 467 U.S. 797 (1984).

Similarly, in ruling on what the trial court dubbed the "control theory" the trial court erred by placing the wrong burden on the plaintiffs. At page 6 of its Order, the Court held: "Plaintiffs have not shown that Mr. Stroupe, the mechanic, was under defendant's control." Again, it is error for the Court to make such a finding based on the allegations of the complaint, as amended. The complaint as amended fairly and clearly alleges that the FAA allowed Mr. Stroupe to have an FAA certificate authorizing him to work on aircraft engines and the complaint as amended fairly and clearly alleges the FAA negligently failed to revoke his certificate on a timely basis. The fact that the FAA had the power to put Mr. Stroupe out of business occurs as a matter of law under the Federal Aviation regulations and therefore need not be pleaded as a fact. 49 U.S.C. §1429.

The trial court clearly and blatantly used the wrong analysis by which to decide a Rule 12(b)(6) motion and therefore the trial court's decision should be reversed. It follows that the Eleventh Circuit departed from the accepted and usual course of judicial proceedings by sanctioning the trial court's error. For this reason, petitioners respectfully pray this court to grant the Writ of Certiorari so that petitioners' claims might be reinstated.

Conclusion

If a dogcatcher unleashed a rabid pit bull in the market place, there would be no question that the town owed a duty to the child subsequently mauled by the dog. Why, then, can there be any question when the FAA knowingly allows an incompetent and fraudulent aircraft mechanic to be turned loose on an unsuspecting public? The United States' argument that the FAA did not make an undertaking with respect to these particular decedents is as absurd as arguing that the town owed no duty to the child because the dogcatcher did not know which person the dog would bite. The United States' argument that the FAA did not increase the risk of harm because only the mechanic increased the risk of harm is as absurd as arguing that the town owed the child no duty because the dogcatcher did not bite the child.

The above discussion clearly demonstrates that the trial court erred in granting a Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Order on its face applies the wrong standard of decision in requiring the Plaintiffs to have provided the Court with proof of facts in response to a Motion to Dismiss. For that reason, the trial court's decision should have been reversed by the Eleventh Circuit. Further, the discussion above clearly demonstrates numerous theories under which the United States could be found to owe a duty of ordinary care to the decedents in this case. There is ample information available from which this Court can rule as a matter of

law that a duty existed, but this Court need not go that far. It is equally obvious that a question of fact would have to exist as to whether or not a duty had arisen, on the part of the government, to act reasonably in order to protect the plaintiffs. It cannot be reasonably asserted that no duty would exist under any possible facts which could be proved on the trial of the claims alleged in Plaintiffs' Complaint as Amended. Therefore, it was again error for the trial court to grant the goverment's Motion to Dismiss; it was error for the Eleventh Circuit to affirm the District Court's dismissal.

Since the Eleventh Circuit ruling establishes a conflict between the Ninth and Eleventh Circuits, since the Eleventh Circuit ruling flies in the face of this Court's holding in Berkovitz, since the Eleventh Circuit has santioned such a blatant departure from the normal handling of judicial proceeedings, the Petitioners respectfully pray this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

BY /s/ James S. Strawinski
James S. Strawinski
Attorneys for Petitioners

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

WILLIAM H. CURTIS and BRENDA M. CLAPP, Administrators of the Estates of John A. Goff, Sr. and Linda A. Goff; JOHN A. GOFF, JR., Surviving Son and GEORGE A. CLAPP, Guardian of JENNIFER ANN GOFF and SUSAN DEBORAH GOFF, Surviving Daughters of John A. Goff, Sr. and Linda A. Goff

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION FILE NO. 3:89-CV-146-GET

COMPLAINT

COME NOW the Plaintiffs, by and through their undersigned counsel, and file their Complaint as follows:

1.

This is a matter in controversy exceeding Fifty Thousand Dollars ($50,000.00), exclusive of interests and costs.

2.

Plaintiffs all reside in the Northern District of Georgia, and the occurrence giving rise to this Complaint took place in the Newnan Division of the Northern District of Georgia. Venue is proper pursuant to Title 28, United States Code, §1402.

3.

This is an action arising under the Federal Tort Claims Act, Title 28, United States Code §§2671-2680, and jurisdiction vests in this Court pursuant to Title 28, United States Code, §1346(b).

4.

The United States of America is sued for negligent acts and omissions of its agents and/or employees, specifically those of the Federal Aviation Administration.

5.

The Plaintiffs have complied with all notice requirements of Title 28, United States Code §2675. The United States has rejected Plaintiffs' claim by letter

dated September 22, 1989, a copy of which is attached hereto as Exhibit "A".

6.

On or about December 6, 1987, Plaintiffs' decedent, John A. Goff, Sr. was flying a Piper Pa-32-260 aircraft, N5587J (hereinafter referred to as the "subject aircraft"), with his wife, Linda A. Goff, when subject aircraft lost engine power during cruise flight and subsequently struck a highway overpass while attempting a forced landing. John and Linda Goff received fatal injuries as a result of this incident, and the aircraft was totally destroyed.

7.

The loss of engine power was a result of an inoperative magneto, incorrect spark plug gaps, a malfunctioning carburetor accelerator pump and leaks in both throttle shaft packings resulting from a negligent or grossly negligent and/or fraudulent engine overhaul performed on the subject aircraft during September, 1987, by John W. Stroupe, Jr. and Coastal Air Engine Service of Gastonia, North Carolina.

8.

In September, 1987, Coastal Air Engine Service of Gastonia, North Carolina, Inc., according to entries signed by John W. Stroupe, Jr., performed a major engine overhaul on the Lycoming 0-540-E4B5 engine, serial number L-9232-40 which had been pulled from the

subject aircraft.

9.

On or about October 1, 1987, John W. Stroupe, Jr. certified the subject aircraft as airworthy.

10.

On or about August 3, 1987, two months prior to certifying the above-mentioned Piper Pa-32-260 airworthy, John W. Stroupe, Jr. was cited by the Federal Aviation Administration for, inter alia, failing "to use proper maintenance techniques and procedures."

11.

On or about October 2, 1987, based upon the conduct originally cited on August 3, 1987, the Federal Aviation Administration revoked on an emergency basis, the certificate of John W. Stroupe, Jr., due to improper maintenance practices and fraudulent entries in maintenance logs.

12.

John W. Stroupe, Jr. had violated Federal Aviation Regulations and his certificates had been suspended or revoked on numerous occasions prior to October 2, 1987.

13.

At all times material to this action, the Defendant, The United States of America, by and through its agents and/or employees had a duty to Plaintiffs' decedents and passengers.

14.

The Defendant The United States of America, breached its duty to the Plaintiffs' decedents by failing to revoke the certificate of John W. Stroupe, Jr. immediately upon learning of the violations for which he was cited on August 3, 1987, and in any event prior to his certification on October 1, 1987, that the subject aircraft was airworthy.

15.

The Defendant, The United States of America, breached its duty to the Plaintiffs' decedents by failing to notify the owner and operator of the subject aircraft that the certificate of John W. Stroupe, Jr. had been revoked by the Federal Aviation Administration on October 2, 1987.

16.

As a direct and proximate result of the negligence of Defendant, The United States of America, the Plaintiffs' decedents were subjected to the terror of an impending

crash and fatal injuries.

17.

At the time of his death on December 6, 1987, Plaintiffs decedent John A. Goff, Sr. was 38 years old, having been born on January 13, 1949. He was married to Plaintiffs' decedent Linda A. Goff and had three children, two of whom are minors.

18.

At the time of her death on December 6, 1987, Linda A. Goff was 38 years of age, having been born on September 8, 1949. She was married to Plaintiffs' decedent John A. Goff and had three children, two of which are minors.

19.

The Defendant, The United States of America, is liable to the Plaintiffs for the full value of the life of their decedents, John A. Goff, Sr. and Linda A. Goff.

20.

The Defendant, The United States of America, is liable to the Estates of John A. Goff, Sr. and Linda A. Goff for the terror experienced by them prior to the fatal crash for conscious pain and suffering after the crash, for emergency medical services, for funeral expenses and burial expenses.

21.

The Estate of John A. Goff, Sr. owns the cause of action for the loss of the aircraft bearing tail number N5587J.

22.

The Defendant, United States of America, is liable to the Estate of John A. Goff, Sr. for the full value of said aircraft which was worth $30,000.00.

WHEREFORE, Plaintiffs pray as follows:

(a) That a summons and copy of this Complaint be served upon the United States of America as provided by law;

(b) That this Court enter a judgment on Behalf of the Plaintiffs against the Defendant for an amount which will be sufficient to compensate them for the full value of the life of their decedents, John A. Goff, Sr. and Linda A. Goff, as shown by all the evidence, without deduction for expenses of the decedent had he lived.

(c) That this Court enter a judgment in favor of the Estates of John A. Goff, Sr. and Linda A. Goff against the Defendant for an amount as will fairly and adequately compensate the Estates for the terror experienced by the decedents prior to the fatal crash, for conscious pain and suffering after the crash, for emergency medical services, for funeral expenses and for

burial expenses; and

(d) That this Court enter a judgment in favor of the estate of John A. Goff, Sr. against the Defendant for $30,000.00 to compensate it for the value of the destroyed aircraft.

(d) For such other and further relief as this Court deems just and proper.

Respectfully submitted,

LONG, WEINBERG, ANSLEY & WHEELER

/s/ James S. Strawinski
James S. Strawinski
Ga. Bar No. 686962

999 Peachtree Street, N. E.
Suite 2700
Atlanta, Georgia 30309
(404) 876-2700

U.S. Department of Transportation
800 Independence Ave., S.W.
Washington, D. C. 20591

Federal Aviation Administration

September 22, 1989

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

James S. Strawinski, Esq.
Long, Weinberg, Ansley & Wheeler
999 Peachtree Street, N. E.
Suite 2700
Atlanta, GA 30309

Re: Claims of William H. Curtis and Brenda M. Clapp as Administrators of the Estate of John A. Gofff, Sr., and Linda A. Goff; claims of John A. Gofff, Jr., and George W. Clapp, guardian of surviving daughters for John A. Goff, Sr., and Linda A. Goff from aircraft accident on December 6, 1987 near LaGrange, Georgia

Dear Mr. Strawinski:

We have completed review of the claims you filed with the Federal Aviation Administration on July 6, 1989, on behalf of the above-referenced claimants. Our review

EXHIBIT "A"

has not disclosed facts upon which a finding of liability on the part of this agency could be based. Accordingly, we must decline to make payment on your claim.

If you are dissatisfied with this determination, you may initiate action in an appropriate United States District Court, pursuant to the provisions of the Federal Tort Claims Act, Title 28 U.S.C. Sections 1346(b) and 2671, et seq., not later than 6 months after the date of mailing of this notification.

Sincerely,
\s\ Gregory S. Walden
Chief Counsel

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

WILLIAM H. CURTIS and BRENDA M. CLAPP, Administrators of the Estates of John A. Goff, Sr. and Linda A. Goff; JOHN A. GOFF, JR., Surviving Son and GEORGE A. CLAPP, Guardian of JENNIFER ANN GOFF and SUSAN DEBORAH GOFF, Surviving Daughters of John A. Goff and Linda A. Goff

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION FILE NO. 3:89-cv-146-GET

FIRST AMENDMENT TO PLAINTIFFS' COMPLAINT

COME NOW Plaintiffs in the above-referenced case and hereby amend their Complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure as follows:

Paragraph 9 of the Complaint will be amended to read as follows:

9.

On or about October 1, 1987, John W. Stroup, Jr. certified the subject aircraft as airworthy. Plaintiffs accepted Mr. Stroup's work because they relied on the FAA's certification that he was competent and qualified to perform work on aircraft engines and to inspect aircraft engines to determine whether they were airworthy.

Paragraph 14 of the Complaint will be amended to read as follows:

14.

The Defendant United States of America, breached its duty to the Plaintiffs' decedents by allowing John W. Stroup, Jr. to re-acquire an FAA certificate after it had been revoked, and the Defendant United States of America breached its duty to Plaintiffs' decedents to revoke the certificate of John W. Stroup, Jr. immediately upon learning of the violations of which he

was cited on August 3, 1987, and in any event prior to his certification on October 1, 1987 that the subject aircraft was airworthy.

Respectfully submitted,

/s/ James S. Strawinski
James S. Strawinski
Ga. Bar No. 686962

999 Peachtree Street, N.E.
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Atlanta, Georgia 30309
(404) 876-2700

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the within and foregoing pleading upon counsel for all parties to this lawsuit by placing a copy of same in the United States Mail to the last known address and with adequate postage affixed thereon to insure delivery as follows:

Ms. Amy Kaminshine
Assistant United States Attorney
United States Department of Justice
1800 U. S. Courthouse
75 Spring Street, S. W.
Atlanta, Georgia 30335

This 30th day of March, 1990.

/s/ James S. Strawinski
James S. Strawinski
State Bar of Georgia No. 686962

LONG, WEINBERG, ANSLEY & WHEELER
Suite 2700
999 Peachtree Street
Atlanta, Georgia 30309
(404) 876-2700

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

WILLIAM H. CURTIS and BRENDA M. CLAPP, Administrators of the Estates of John A. Goff, Sr., and Linda A. Goff; JOHN A. GOFF, JR., Surviving Son and George A. Clapp, Guardian of JENNIFER ANN GOFF and SUSAN DEBORAH GOFF, Surviving Daughters of John A. Goff and Linda A. Goff

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION FILE NO. 3:89-cv-146-GET

DEFENDANT'S MOTION TO DISMISS

COMES NOW the defendant, by and through the United States Attorney for the Northern District of Georgia, and moves this court to dismiss plaintiff's complaint pursuant to Rule 12(b)(1) and (6), Fed.R.Civ.P.,

on the grounds of lack of subject matter jurisdiction and, failure to state a claim upon which relief can be granted.

The grounds for this motion are set forth in the accompanying memorandum of law.

Respectfully submitted,

RIMANTAS A. RUKSTELE
UNITED STATES ATTORNEY

/s/ Amy B. Kaminshine
AMY B. KAMINSHINE
ASSISTANT U.S. ATTORNEY

1800 U. S. Courthouse
75 Spring Street, S. W.
Atlanta, Georgia 30335
404-331-4681
Georgia Bar No. 006670

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

WILLIAM H. CURTIS and BRENDA M. CLAPP, Administrators of the Estates of John A. Goff, Sr. and Linda A. Goff; John A. Goff, Jr., Surviving Son and Geoge A. Clapp, Guardian of JENNIFER ANN GOFF and SUSAN DEBORAH GOFF, Surviving Daughters of John A. Goff, Sr. and Linda A. Goff

v.

UNITED STATES OF AMERICA

CASE NO. 3:89-cv-46-GET

ORDER

The above styled matter is before the court on defendant's motion to dismiss pursuant to F.R.C.P. Rules 12(b)(1) and 12(b)(6).

The underlying action involves a suit against the United States of America for negligence brought

pursuant to the Federal Tort Claims Act ("F.T.C.A."), 28 U.S.C. § 2671 et. seq. On December 6, 1987, John A. Goff, Sr. and Linda A. Goff were killed in a plane crash in LaGrange, Georgia. Plaintiffs are the personal representatives of the decedents.

Plaintiffs contend that, four months before the plane crash, on August 3, 1987, the Federal Aviation Administration ("F.A.A.") had "cited" John Winslow Stroup, Jr., a certified mechanic employed by Coastal Air Engine Service of Gastonia, North Carolina ("Coastal"), for "failing to use proper maintenance techniques and procedures" and for "making several fraudulent entries in his maintenance log." Furthermore, plaintiffs assert, since 1953, Mr. Stroup has had a long history of problems as a mechanic and the F.A.A. has had knowledge of these problems.

In September, 1987, the plane in which the Goffs were killed was overhauled by Mr. Stroup and on October 1, 1987, Mr. Stroupe issued a certificate of airworthiness for the plane.

On October 2, 1987, the F.A.A., based on the conduct stated in the August 3, 1987 citation, "revoked on an emergency basis" Mr. Stroupe's certification as an airplane mechanic.

Plaintiffs assert two theories of negligence liability against defendant. First, the F.A.A. breached its duty owed to the Goffs by failing to revoke Mr. Stroupe's mechanic's certification on August 3, 1987, the date on

which it had actual knowledge of his maintenance violations. Second, the F.A.A. breached its duty owed to the Goffs when it failed to notify the owner of the plane that on October 2, 1987, Mr. Stroupe's mechanic's certification had been revoked and that the plane may not be airworthy as certified by Mr. Stroupe on October 1, 1987.

Dismissal for Lack of Subject-Matter Jurisdiction

In its motion to dismiss, defendant states that plaintiffs' complaint should be dismissed, pursuant to F.R.C.P. Rule 12(b)(1), for lack of subject-matter jurisdiction. In its brief in support of its motion to dismiss, defendant, however, does not argue for dismissal under Rule 12(b)(1). Furthermore, the court notes that it has jurisdiction over this suit pursuant to 28 U.S.C. § 1346(b). Therefore, the court DENIES defendant's motion to dismiss for lack of subject-matter jurisdiction.

Dismissal for Failure to State a Claim

In a motion to dismiss, the court must accept the plaintiffs' allegations as true. Furthermore, the movant has the burden to show "clearly that no relief could be granted [to the plaintiffs] under any set of facts." Conley v. Gibson 335 U.S. 41, 46, 78 S. Ct. 99 (1957).

Under the F.T.C.A., the United States partially waives its sovereign immunity and consents to be sued for certain common law torts. 28 U.S.C. § 1346(b), confers jurisdiction on the federal courts for F.T.C.A. suits and

provides in pertinent part

> The district courts shall have exclusive jurisdiction of civil actions on claims against the United States . . . for personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. (emphasis supplied by court).

In Sellfors v. United States, 697 F.2d 1362, 1367 (11th Cir. 1983), quoting with approval from Zabala Clemente v. United States, 567 F.2d 1140 (1st Cir. 1970), the court held

> even where the specific behavior of federal employees is required by [federal] statute, liability to the beneficiaries of that statute may not be founded on the Federal Tort Claims Act if state law recognizes no comparable private liability.

In other words, plaintiffs must show that a private person would be liable under applicable state law for the alleged acts or omissions perpetrated by the government employee.

Under the F.T.C.A., in cases where the alleged negligence occurred in one state but the injury resulted

in a different state, courts borrow the tort law of the state in which the negligent acts or omissions occurred. See Richards v. United States, 369 U.S. 1, 82 S. Ct. 585 (1962) and Foster v. United States, 768 F.2d 1278 (11th Cir. 1985). In its motion to dismiss, defendant states that the substantive tort law of Georgia applies in the instant case because "the alleged governmental negligence occurred in Georgia." Plaintiffs apparently agree with defendant. The court notes that it does not matter whether the alleged negligence occurred in Georgia or North Carolina because the substantive tort law in both states is the same.

Under Georgia law, in order to maintain an action in tort, defendant must have breached a duty owed to plaintiffs. See Stone Mountain Game Ranch, Inc. v. Hunt, 746 F.2d 761, 766 (11th Cir. 1984).

In their brief in opposition to defendant's motion to dismiss, plaintiffs state two theories under which defendant owed plaintiffs a duty: the good samaritan doctrine and the "control" theory.

1.) The Good Samaritan Doctrine

The good samaritan doctrine has four elements: (1) an undertaking to render services; (2) the services are to be rendered to another; (3) the person undertaking the services should recognize that those services are necessary for the protection of a third party; and (4) the undertaking either increases the risk of harm or the harm was suffered because of reliance by the third

person upon the undertaking. See Huggins v. Aetna Casualty and Surety Company, 245 Ga. 248, 264 S.E.2d 191 (1980).

In Sellfours v. United States, 697 F.2d 1362 (11th Cir. 1983), the court held that under Georgia law, "where one does not create the dangerous situation and takes no remedial measures, he is not liable [under the good samaritan doctrine]." In addition, the court held, that to establish liability under the Georgia good samaritan doctrine, there must be "actual reliance" by the decedents on the undertaking.

In Howell v. United States, Civil Action No. 1:88-cv-1930-RCF (N.D. Ga. December 11, 1989), plaintiffs sought recovery against the United States pursuant to the F.T.C.A. because an F.A.A. inspector had failed to "ground a plane" which the inspector knew contained contaminated fuel. The court found that the inspector had not been responsible for the fuel contamination, and, therefore, he had not created the hazardous situation. Relying on Sellfours and Zabala Clemente, the court found that the inspector had no duty under the Georgia good samaritan doctrine to take remedial measures.

The court concludes that plaintiffs have failed to establish the existence of a duty under the Georgia good samaritan doctrine. The plaintiffs have not shown that the F.A.A.'s "undertaking" to certify the mechanic was for their specific or individual benefit. Moreover, in their brief, plaintiffs assert that Mr. Stroupe negligently inspected the plane. Therefore, under the facts urged by

plaintiffs, defendant did not create the hazardous situation, and, therefore, defendant is not liable for failing to take remedial measures. Finally, plaintiffs have failed to present any factual support for their conclusion that the decedents "actually relied" on the F.A.A. inspection.

2.) The "Control" Theory

Plaintiffs also argue that defendant owes plaintiffs a duty under the "control" theory of liability adopted by the Georgia courts in Bradley center v. Wessner, 161 Ga. App. 576, 580; 287 S.E.2d 716 (1982), affirmed, 250 Ga. 199; 296 S.E.2d 693 (1982). In that case, a psychiatric hospital released on a weekend furlough a patient who the hospital staff knew was likely to cause "bodily injury" to his wife. During his furlough, the patient killed his wife. The Supreme Court of Georgia found that the hospital owed a duty to the decedent under Restatement, Torts, (Second) § 315 which provides in pertinent part:

> One who takes charges of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

This theory does not create a duty on the part of defendant to decedent. Plaintiffs have not shown that Mr. Stroupe, the mechanic, was under defendant's control.

For the foregoing reasons, the court GRANTS defendant's motion to dismiss for failure to state a claim.

Summary

(1) The court DENIES defendant's motion to dismiss for lack of subject matter jurisdiction, and

(2) the court GRANTS defendant's motion to dismiss for failure to state a claim upon which relief can be granted.

SO ORDERED, this 22 day of September, 1990.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT

JUDGMENT ON DECISION BY THE COURT

FOR THE UNITED STATES DISTRICT COURT
NORTHERN DISTRI CT OF GEORGIA,
NEWNAN DIVISION

WILLIAM H. CURTIS and BRENDA M. CLAPP,
etc. et al

Plaintiffs

vs.

UNITED STATES OF AMERICA

Defendant

CIVIL ACTION DOCKET NO. 3:89-cv 146 GET

JUDGMENT

This action came on for consideration before the court, United States District Judge G. ERNEST TIDWELL presiding. The issues having been duly considered and a decision having been duly rendered, granting defendant's motion to dismiss

IT IS ORDERED AND ADJUDGED that the plaintiffs, WILLIAM H. CURTIS and BRENDA M.

CLAPP, Administrators of the Estates of John A. Goff, Sr. and Linda A. Goff; John A. Goff, Jr., Surviving Son and George A. Clapp, Guardian of JENNIFER ANN GOFF and SUSAN DEBORAH GOFF, Surviving Daughters of John A. Goff, Sr. and Linda A. Goff, take nothing, that the action be dismissed and that the defendant, UNITED STATES OF AMERICA, recover costs of action.
***

Filed and entered in
the Clerk's Office
September 27, 1990
LUTHER D. THOMAS, CLERK

By: /s/ Danny Brown
Danny Brown
Deputy Clerk

September 27, 1990 Newnan, Georgia
Dated at: Newnan, Georgia Date: September 27, 1990

Luther D. Thomas, Clerk

/s/ Danny Brown
Deputy Clerk of the Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-9010
D. C. DOCKET NO. 3:89-cv-146-GET

WILLIAM H. CURTIS, and BRENDA M. CLAPP, Administrators of the Estate of John A. Goff, Sr. and Linda A. Goff: John A. Goff, Jr., surviving son and George A. Clapp, Guardian of Jennifer Ann Goff and Susan Deborah Goff, Surviving daughters of John A. Goff, Sr., and Linda A. Goff,
Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(August 15, 1991)

Before JOHNSON and EDMONDSON, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIUM:
AFFIRMED. See 11th Cir. R. 36-1.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 90-9010

WILLIAM H. CURTIS and BRENDA M. CLAPP, Administrators of the Estate of John A. Goff, Sr., and Linda A. Goff; JOHN A. GOFF, JR., surviving son and George A. Clapp, Guardian of JENNIFER ANN GOFF and SUSAN DEBORAH GOFF, Surviving daughters of John A. Goff, Sr., and Linda A. Goff,

Plaintiffs-Appellants

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion August 15, 1991, 11th Cir., 19__, ___ F.2nd ___).

Before: JOHNSON and EDMONDSON, Circuit Judges, and DYER, Senior Circuit Judge.
PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson, Jr.
UNITED STATES CIRCUIT JUDGE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT. 16, 1991
MICHAEL J. CORTEZ
CLERK

49 U.S.C. § 1301

§ 1301. Definitions

. . .

(7) "Airman" means any individual who engages, as the person in command or as pilot, mechanic, or member of the crew, in the navigation of aircraft while under way; and (except to the extent the Secretary of Transportation may otherwise provide with respect to individuals employed outside the United States) any individual who is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft, aircraft engines, propellers, or appliances; and any individual who serves in the capacity of aircraft dispatcher or air-traffic control-tower operator.

49 U.S.C. app. § 1302

§ 1302. Consideration of matters in public interest by Board.

(a) Factors for interstate, overseas, and foreign air transportation

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(1) The assignment and maintenance of safety as the highest priority in air commerce, and prior to the authorization of new air transportation services, full evaluation of the recommendations of the Secretary of Transportation on the safety implications of such new services and full evaluation of any report or recommendation submitted under section 1307 of this title.

(2) The prevention of any deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of the Congress to the furtherance of the highest degree of safety in air transportation and air commerce, and the maintenance of the safety vigilance that has evolved within air transportation and air commerce and has come to be expected by the traveling and shipping public.

49 U.S.C. app. § 1305

§1305. Federal preemption

(a) Preemption

(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

(2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under section 1371 of this title, the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

49 U.S.C. app. § 1421

§ 1421. Powers and duties of Secretary of Transportation

(a) Minimum standands; rules and regulations

The Secretary of Transportation is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Secretary of Transportation, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Secretary of Transportation may accept in lieu of those made by its officers and employees; . . .

49 U.S.C. app. § 1429

§ 1429. Reinspection or reexamination; amendment, suspension, or revocation of certification

(a) Procedure; notification; hearing; appeal to National Transportation Safety Board; judicial review

The Secretary of Transportation may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Secretary of Transportation, he determines that safety in air commerce or air transportation and the public interest requires, the Secretary of Transportation may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificate), or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Secretary of Transportation shall advise the holder thereof as to any charges or other reasons relied upon by the Secretary of Transportation for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by

such an order of the Secretary of Transportation under this section may appeal the Secretary of Transportation's order to the National Transportation Safety Board and the National Transportation Safety Board may, after notice and hearing, amend, modify, or reverse the Secretary of Transportation's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Secretary of Transportation's order. In the conduct of its hearings the National Transportation Safety Board shall not be bound by findings of fact of the Secretary of Transportation. The filing of an appeal with the National Transportation Safety Board shall stay the effectiveness of the Secretary of Transportation's order unless the Secretary of Transportation advises the National Transportation Safety Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the National Transportation Safety Board shall finally dispose of the appeal within sixty days after being so advised by the Secretary of Transportation. The person substantially affected by the National Transportation Safety Board's order may obtain judicial review of said order under the provisions of section 1486 of this title, and the Secretary of Transportation shall be made a party to such proceedings.

FAA INVESTIGATIVE AND ENFORCEMENT PROCEDURES

14 C.F.R. § 13.19 (1988)

§13.19. Certificate action

(a) Under section 609 of the Federal Aviation Act of 1958 (49 U.S.C. 1429), the Administrator may reinspect any civil aircraft, aircraft engine,, propeller, appliance, and navigation facility, or air agency, and may re-examine any civil airman. Under section 501(e) of the FA Act, any Certificate of Aircraft Registration may be suspended or revoked by the Administrator for any cause that renders the aircraft ineligible for registration.

(b) If, as a result of such a reinspection, re-examination, or other investigation made by the Administrator under section 609 of the FA Act, the Administrator determines that the public interest and safety in air commerce requires it, the Administrator may issue an order amending, suspending, or revoking, all or part of any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. This authority may be exercised for remedial purposes in cases involving the Hazardous Materials Transportation Act (49 U.S.C. 1801 et seq.) or regulations issued under that Act. This authority is also exercised by the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the

Regional Counsel concerned. If the Administrator finds that any aircraft registered under Part 47 of this chapter is ineligible for registration or if the holder of a Certificate of Aircraft Registration has refused or failed to submit AC Form 8050-73, as required by §47.51 of this chapter, the Administrator issues an order suspending or revoking that certificate. This authority as to aircraft found ineligible for registration is also exercised by the Aeronautical Center Counsel.

(c) Before issuing an order under paragraph (b) of this section, the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Regional Counsel concerned, or the Aeronautical Center Counsel (as to matters under Title V of the FA Act) advises the certificate holder of the charges or other reasons upon which the Administrator bases the proposed action and, except in an emergency, allows the holder to answer any charges and to be heard as to why the certificate should not be amended, suspended, or revoked. The holder may, by checking the appropriate box on the form that is sent to the holder with the notice of proposed certificate action, elect to --

(1) Admit the charges and surrender his or her certificate;

(2) Answer the charges in writing;

(3) Request that an order be issued in accordance with the notice of proposed certificate action so that the certificate holder may appeal to the National Transportation Safety Board, if the charges concerning a matter under Title VI of the FAAct;

(4) Request an opportunity to be heard in an

informal conference with the FAA counsel; or

(5) Request a hearing in accordance with Subpart D of this part if the charges concern a matter under Title V of the FA Act.

Except as provided in §13.35(b), unless the certificate holder returns the form and, where required, an answer or motion, with a postmark of not later than 15 days after the date of receipt of the notice, the order of the Administrator is issued as proposed. If the certificate holder has requested an informal conference with the FAA counsel and the charges concern a matter under Title V of the FAAct, the holder may after that conference also request a formal hearing in writing with a postmark of not later than 10 days after the close of the conference. After considering any information submitted by the certificate holder, the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Regional Counsel concerned, or the Aeronautical Center Counsel (as to matters under Title V of the FA Act) issues the order of the Administrator, except that if the holder has made a valid request for a formal hearing on a matter under Title V of the FA Act initially or after an informal conference, Subpart D of this part governs further proceedings.

(d) Any person whose certificate is affected by an order issued under this section may appeal to the National Transportation Safety Board. If the certificate holder files an appeal with the Board, the Administrator's order is stayed unless the Administrator advises the Board that an emergency exists and safety in

air commerce requires that the order become effective immediately. If the Board is so advised, the order remains effective and the Board shall finally dispose of the appeal within 60 days after the date of the advice. This paragraph does not apply to any person whose Certificate of Aircraft Registration is affected by an order issued under this section.

FAA MAINTENANCE, PREVENTIVE MAINTENANCE, REBUILDING, AND ALTERATION REGULATIONS

14 C.F.R. § 43.5 (1988)

§43.5 Approval for return to service after maintenance, preventive maintenance, rebuilding, or alteration.

No person may approve for return to service any aircraft, airframe, aircraft engine, propeller, or appliance, that has undergone maintenance, preventive maintenance, rebuilding, or alteration unless --

(a) The maintenance record entry required by § 43.9 or § 43.ll, as appropriate, has been made;

(b) The repair or alteration form authorized by or furnished by the Administrator has been executed in a manner prescribed by the Administrator; and

(c) If a repair or an alteration results in any change in the aircraft operating limitations or flight data contained in the approved aircraft flight manual, those operating limitations or flight data are appropriately revised and set forth as prescribed in § 91.31 of this chapter.

FAA MAINTENANCE, PREVENTIVE MAINTENANCE, REBUILDING, AND ALTERATION REGULATIONS

14 C.F.R. § 43.7 (1988)

§43.7 Persons authorized to approve aircraft, airframes, aircraft engines, propellers, appliances. or component parts for return to service after maintenance, preventive maintenance, rebuilding, or alteration.

(a) Except as provided in this section and § 43.17, no person, other than the Administrator, may approve an aircraft, airframe, aircraft engine, propeller, appliance, or component part for return to service after it has undergone maintenance, preventive maintenance, rebuilding, or alteration.

(b) The holder of a mechanic certificate or an inspection authorization may approve an aircraft, airframe, aircraft engine, propeller, appliance, or component part for return to service as provided in Part 65 of this chapter.

FAA GENERAL OPERATING AND FLIGHT RULES

14 C.F.R. § 91.29 (1988)

§91.29 Civil aircraft airworthiness.

(a) No person may operate a civil aircraft unless it is in an airworthy condition.

(b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. He shall discontinue the flight when unairworthy mechanical or structural conditions occur.

ORDER 2150.3, CHAPTER 2
COMPLIANCE AND ENFORCEMENT PROGRAM, DOT/FAA, MAY 16, 1980

200. PURPOSE. The purpose of this chapter is to set forth the policies and objectives of the Federal Aviation Administration as established by this order and by policy statements or directives issued by the Administrator.

201. GENERAL. The FAA is charged with the responsibility to assure that the highest possible degree of safety in air transportation and air commerce is maintained. To achieve this, the agency first must establish regulatory standards and requirements.

a. Once the regulations are in effect, to assure effective implementation the agency must provide for the education and guidance needed by the industry and the public. The importance of this step, and the related personal and organizational skills needed, cannot be overemphasized. In the absence of thorough understanding, compliance with safety regulations cannot be achieved.

b. Finally, the agency has a statutory obligation to assure compliance with all regulations. This obligation is especially critical as it applies to the holders of FAA certificates. Individual inspectors, managers, and attorneys must clearly understand the crucial role they play in achieving compliance. However, providing

guidance and training to industry, as crucial as that role is, must be kept in proper perspective. Once a certificate or an amendment involving that certificate is issued, the holder (individual, operator, manufacturer, supplier, etc.) must be held responsible for compliance. This may best be looked on as a total enforcement concept. As an example, the responsible field office should respond as forcefully, through investigation, reporting, and follow-up, to an airport certificate holder who fails to comply with firefighting equipment requirements, as another field office will respond to an aircraft manufacturer's use of materials that do not conform to specifications in a type design; or still another field office will respond to the operation of an aircraft over congested areas below minimum safe altitudes. The Administrator's enforcement policy does not vary by internal agency discipline. Each certification and operating rule is important in achieving overall safety objectives. The FAA enforcement program described in this handbook is equally applicable to all activities regulated by the agency, including programs which may have traditionally used different methods of obtaining compliance. When violations occur, whether they involve the operation of an airport, the production of aircraft, the performance of aircraft maintenance, or the operation of aircraft, FAA personnel responsible for enforcing those regulations shall investigate, report, and process such matters for appropriate enforcement action consistent with this order.

a. Federal Aviation Act of 1958. The Federal Aviation Act of 1958 places a duty on the Administrator

to prescribe reasonable rules, regulations, orders, and minimum standards in the public interest. Once a regulation is issued, it is expected there will be compliance with all requirements contained in the regulation. A violation of any regulation must be responded to with an effective enforcement program.

b. Airline Deregulation Act of 1978. Section 107 of the Act states that Congress intends that the Act's implementation result in no diminution of the high standard of safety in air transportation attained in the United States.

203. ENFORCEMENT PROGRAM. The objectives of the enforcement program as set forth in Order 1000.9C, Enforcement Policy, are achieved through surveillance and detection, investigation, and enforcement processing.

a. Surveillance and Detection. An essential part of the enforcement program is that violations and potential violations be discovered at the earliest possible time. In any situation where inspectors identify a potential violation, they should act to prevent it. For example, an airworthiness inspector who finds an air carrier aircraft, about to be used in air transportation, that is not in condition for safe operation shall notify the air carrier of that condition in accordance with the provisions of Section 605(b) of the FA Act (see Figure 2-1, Sample Notice of Aircraft Condition). Every alleged violation must be identified, reported, and processed in an appropriate manner. Any agency employee who becomes aware of apparent violations shall report such

violations to responsible agency elements and shall cooperate with subsequent investigations. Consistent with the agency's statutory mandate contained in the FA Act and the Airline Deregulation Act, there must be a particularly high level of surveillance of commercial air transportation operations. In addition, special attention must be given to commuter and air taxi operator compliance.

b. Investigation. Prompt action is essential to assure a fair enforcement program. Unnecessary delays in the investigation cannot be tolerated. Every effort must be made to expeditously investigate and report violations. The responsibility to act promptly rests equally upon the inspector investigating the incident as well as the regional and Washington offices responsible for enforcement action. Delays in processing violation reports weaken the effectiveness of the agency's enforcement program in several ways. First, such delays may permit an unsafe condition to prevail if prompt corrective action is not taken. Secondly, delays tend to deemphasize the seriousness of a given violation. In this manner, prolonged delays tend to strengthen the violator's case. By the same token, if the alleged violator is innocent, any unwarranted delay in processing the case may impose an unjustified hardship. In order that enforcement actions be objective and fair, there must an unbiased gathering of all facts, precise investigation, and accurate and prompt reporting. A violation report without all of the facts only leads to delays and thus, the objective of fair enforcement is lost. Such reports can also mislead reviewing authorities and

result in embarrassment for the agency. Poor investigation weakens the effectiveness of the enforcement program. It is important that the investigation be planned and conducted in a manner consistent with the complexities involved. For example, routine investigation of a low-flight incident may only require interviews of witnesses to the violation. On the other hand, allegations involving an aircraft manufacturer's failure to properly maintain a quality control system during the production of aircraft may require careful investigatory planning, early coordination with legal counsel, subpoena of documents, and other use of the Administrator's authority under Section 1004 of the FA Act. As part of the investigation, all special and mitigating circumstances associated with the violation, as well as information which tends to undermine an allegation, should be contained in the report. An inspector who is not attentive to special mitigating circumstances may only provoke resentment, making it more difficult to obtain compliance and cooperation in the future from all parties, including witnesses. See Chapter 4 for guidance in planning and conducting investigations.

c. Enforcement Processing. When violations occur, firm action must be taken. A vigorous enforcement policy is necessary to achieve compliance with the regulations and we must forcefully respond to violations. Firmness should be balanced with fairness.

(1) Policy. Compliance with the regulations is promoted through both administrative and

formal legal actions. Administrative actions (warning letters or letters of correction) are utilized to check potentially unsafe practices in situations where formal actions are unnecessary or inappropriate. Formal legal actions are undertaken to:

(a) Enjoin conduct, before the act, which would violate the regulation (e.g., cease and desist orders, injunctions, aircraft seizures);

(b) Impose punitive sanctions, after the act, to deter violations (e.g., certificate actions, civil penalties);

(c) Achieve remedial purposes (e.g., certificate suspension pending demonstration of qualifications; revocation for lack of certificate qualifications).

(2) Judgement in Selecting Appropriate Action. It is difficult, solely by order, to establish guidelines which will correctly categorize all regulatory infractions so as to pin point the appropriate enforcement action. The ultimate decision must be the product of judgement and experience applied to the facts and circumstances of the individual case. Inspectors and field office chiefs must continue to exercise good judgement in handling first offense violations which meet the criteria for administrative action and can be so handled with dispatch. If, however, the violation does not fit that criteria or there is deceit or incompetence involved, take strong action. Use the maximum sanctions

appropriate. If monetary sanction against any certificate holder is insufficient to get and keep their attention, do not hesitate to use certificate action. Enforcement and investigative personnel can expect that their diligent efforts will be given full support at all levels of the FAA.

(3) National Uniformity. Each region must make every effort to achieve uniformity of enforcement action. Similar violations under similar circumstances should result in the same type of enforcement action and sanction. The geographical concept of enforcement will aid the regions in achieving this goal on all violations, regardless of the violators domicile. However, all personnel must remain alert to actions which have been taken on similar violations in other regions as well as within their own region, to achieve the overall goal of national uniformity. To assist in this effort, information regarding enforcement actions, including program areas requiring emphasis, will be the subject of compliance/enforcement bulletins when the need is identified.

204. ADMINISTRATIVE ACTION. Administrative enforcement action may be taken in lieu of legal enforcement action only when ALL of the following elements are present:

a. No significant unsafe condition existed;

b. Lack of competency or qualification was not involved;

c. The violation was not deliberate; and

d. The alleged violator has a constructive attitude toward complying with the regulations, and has not been involved in previous similar violations.

205. DETERMINING THE TYPE OF LEGAL ENFORCEMENT ACTION. It is the inspector's responsibility to initially recommend the appropriate enforcement action. All involved elements of the FAA are then responsible for evaluating the seriousness of a violation, defining its impact on safety, and judging the necessary action to obtain compliance. It is the intent of the following guidelines to assure greater national uniformity in enforcement actions.

a. Civil penalty.

(1) Civil penalty action is normally used as the sanction in cases where the violator does not hold any current certificates, in cases where a violator holds a certificate but no question of qualification is involved, or where the facts or circumstances are too serious to handle by administrative type enforcement action. Civil penalty action may also be used in lieu of certificate action where a suspension is not necessary to obtain immediate corrective action. For example, where a major air carrier is involved in a maintainance violation and has taken satisfactory corrective action, a substantial civil penalty will serve as an appropriate deterent without disrupting essential air service to the public. Civil penalities also may be initiated in any case where normally a suspension would be manifestly unfair or

create an undue hardship and is not required for aviation safety. However, when there is a serious ongoing safety violation involved, and immediate corrective action cannot be obtained, certificate action should be considered notwithstanding hardship to the certificate holder or disruption of public service.

(2) Civil penalty action will not normally be used as an additional sanction to certificate action. It should not be used as a substitute for certificate or restraining action when competence, attitude, or other circumstances are such that the same or similar violation is likely to occur.

b. Certificate action - suspension.

(1) Suspension action should be considered in all cases where safety requires it. For example, it should be utilized against an aircraft component manufacturer involved in serious quality control violations, whose product must be prevented from entering into service until adequate corrective actions are completed.

(2) It should be used in all cases where technical proficiency or qualification warrants, as in the case of an unqualified mechanic.

(3) Suspension action is warranted in situations where a certificate holder resists reexamination or reinspection under Section 609 of the Federal Aviation Act, or the reexamination or reinspection is not

satisfactorily accomplished within a reasonable length of time (see Chapter 8).

(4) Suspension may be used for punitive purposes where the nature of the violation warrants it, except in cases where over six months have elapsed since the date of alleged violation. (See 49 CFR 821.33, NTSB Rules of Practice). The withdrawal of the privileges of certificate is a natural, equitable, and just consequence of the abuse of such privileges.

c. Certificate action - revocation.

(1) Revocation of a certificate or a rating should be sought in all cases where there is lack of capability or other deficiency incapable of immediate correction; in cases where the certificate holder has demonstrated by repeated offenses an unwillingness or inability to comply with the principles of air safety; and in cases where the continued exercise by the individual of the privileges of the certificate would be detrimental to the public interest. For example, revocation should be sought in cases where an aircraft is used for smuggling or transporting narcotics, or where there is falsification of records.

(2) In cases involving organizations, revocation should be sought where their conduct demonstrates a lack of qualification; i.e., deliberate and flagrant violations; falsification of records.

d. Other recommended action. In addition to

the recommendation for legal enforcement action, the field office should determine the possible need for any additional or special enforcement action and, when appropriate, submit such recommendations to the regional office. This may include recommendations for:

(1) Emergency suspension or revocation of certificates.

(a) Emergency action in suspending or revoking a certificate or manufacturing approval should be taken ONLY when it is clearly needed in the public interest and must be taken immediately when the need for such action is recognized. The emergency authority will not be used for punitive reasons. Evidence for such action must show a lack of qualification or that the certificate holder likely will continue exercising the privileges of the certificate.

(b) The following are examples of when emergency action might be appropriate:

1 When the holder of a pilot certificate has deliberately engaged in reckless or dangerous flying.

2 Where an airport operator has no firefighting or rescue equipment and service capability due to a labor strike.

3 When the holder of an airman medical continues to operate as pilot-in-command

of aircraft after having been informed by the FAA that he or she no longer qualifies for the medical certificate.

4 When the holder of a production certificate fails to maintain its approved quality control system, and continues to submit non-conforming or unsafe products for airworthiness certification or approval.

5 When the holder of a repair station certificate returns unairworthy aircraft to service, and it is determined that they do not have an inspection system that will produce satisfactory quality control.

(2) Seizure of Aircraft. Under certain conditions described in paragraph 1205a, when an aircraft is involved in a violation of the Federal Aviation Regulations and the violation is by the aircraft owner or person in command, the aircraft may be summarily seized. A "person in command," as used in this context, is interpreted to be any person who causes or authorizes the operation of an aircraft, whether with or without the right of legal control of the aircraft, including the pilot in command. Seizure action, when appropriate, may be recommended regardless of the status of the investigation or legal processing of any prior violation(s).

(3) Cease and desist orders, orders of compliance, and injunctions. Whenever the inspector determines that a condition requiring immediate action exists, in respect of safety in air commerce, the field

office should bring the matter to the attention of the regional office to consider the appropriateness of issuing a cease and desist order, an order of compliance, or initiating action in U.S. district court for injunctive relief. (See paragraphs 1206, 1207, 1209, 1210 and 1211.)

(4) Criminal prosecution. If the inspector's investigation discloses any evidence of willful conduct which could constitute violations of any criminal provisions of the Federal Aviation Act of 1958, the Hazardous Materials Transportation Act, or of any other Federal criminal statute of which he is aware, the field office should bring such information to the attention of the regional office (see Chapter 6).

(5) Procedure. When it is determined that emergency suspension or revocation, aircraft seizure, order of compliance, cease and desist order or injunction action, or criminal prosecution is appropriate, the field office shall immediately inform the regional office of the facts and circumstances. In support of these recommendations, the inspector must complete and process the Enforcement Investigative Report as expeditiously as possible.

[Spelling and grammatical errors in the original].

2A J. MOORE, W. TAGGART & J. WICKER, MOORE'S CIVIL PRACTICE, ¶ 1207 [2.-5] (2d ed. 1985)

[2.-5] - Failure to state a claim upon which relief can be granted.

A motion to dismiss for failure to state a claim upon which relief can be granted performs substantially the same function as the old common-law demurrer. A dismissal under this provision is on the merits and is accorded res judicata effect. For this reason, dismissal under subdivision (b)(6) is generally disfavored by the courts.

The burden of demonstrating that no claim has been stated is upon the movant. In determining the motion, the court must presume all factual allegations of the complaint to be true and all reasonable inferences are made in favor of the non-moving party. However, legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness.

Generally, the allegations of a complaint are to be liberally construed. This is especially true when the complaint is made pro se.

After thus construing the complaint, the court should deny a motion to dismiss for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In Scheuer v. Rhodes, the

Supreme Court stated:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter of for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

In making this determination, the likelihood that plaintiff will prevail is immaterial, as is the fact that the requested relief is inappropriate, or the legal theories have been miscategorized.

The court may not consider any material other than the pleadings in determining a motion under subdivision (b)(6) unless it converts the motion into a motion for summary judgment under Rule 56.

However, material which is submitted as part of the complaint, as well as certain items in the record and the public record, may be considered by the court.

Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief, or if the plaintiff fails to properly allege standing. A motion under Rule 12(b)(6) should also be granted if an affirmative defense or other bar to relief is apparent from the face of the complaint, such as the official immunity of a defendant, or the statute of limitations. Lack of capacity to be sued may also be raised by a Rule 12(b)(6) motion.

Related to Rule 12(b)(6) is 28 USC § 1915(d), which permits the court to dismiss an application by a plaintiff to proceed in forma pauperis if the action is frivolous or malicious. Some courts have held that this provision is broader than Rule 12(b)(6) and permits dismissals of actions which might withstand a motion under the Rule. For example, in Jones v. Bales the court held that an action could be dismissed as frivolous under § 1915(d) if "plaintiff's realistic chances of ultimate success are slight." The prevailing view, however, has regarded the standard for dismissal under § 1915(d) as being essentially identical to that under Rule 12(b)(6), in light of the lenient treatment accorded pro se complaints generally. Unlike dismissals under 28 USC § 1915(d), dismissals under Rule 12(b)(6) should ordinarily not be made ex parte, although the court may order dismissal on its own motion if process has been issued and served and plaintiff is given notice and an opportunity to respond.

If a motion under Rule 12(b)(6) is granted, ordinarily an opportunity to amend should be fully granted if the

deficiencies in the complaint can be corrected by amendment.

[All Footnotes omitted]

RESTATEMENT (SECOND) OF TORTS §319 (1964)

§319. Duty of Those in Charge of Person Having Dangerous Propensities

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

RESTATEMENT (SECOND) OF TORTS § 324(A) (1964)

§324A. Liability to third person for negligent performance of undertaking.

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) He has undertaken to perform a duty owed by the other to the third person, or

(c) The harm is suffered because of the reliance of the other or the third person upon the undertaking.